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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-763

AUBREY GROSSMAN, *Petitioner,*

vs.

DONALD STRIEPEKE, Sheriff of County of Sonoma, State of California, *Respondent.*

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Two, dated March 31, 1972, is reported at 24 Cal.App.3d 624, 101 Cal. Rptr. 176 (1972) In addition, petitioner has attached a copy of the opinion as Appendix H to his petition. That opinion likewise reflects the fact that petitioner's request for a hearing was denied by the California Supreme Court on May 23, 1972. 24 Cal.App.3d at 649, 101 Cal.Rptr. at 176.

The order of the United States District Court, Northern District of California, dated July 5, 1972, is unreported.

The original memorandum opinion of the United States Court of Appeals for the Ninth Circuit, dated July 11, 1973, is likewise unreported. Petitioner has attached a copy of the memorandum as Appendix B to his petition. That court's remand order of August 8, 1974, following this Court's grant of certiorari and subsequent remand for reconsideration in light of *Taylor v. Hayes*, 418 U.S. 488 (1974), is unreported. Petitioner has attached a copy of the order as Appendix D to his petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Title 28, United States Code section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals, after being directed by this Court to reconsider its earlier decision in light of *Taylor v. Hayes*, 418 U.S. 488 (1974), properly limited its reconsideration to that of *Taylor v. Hayes* applicability to issues originally raised by petitioner before the District Court and thence on appeal to the Court of Appeals.

   a. Whether the Court of Appeals properly refused to consider the applicability of *Taylor v. Hayes* to an issue first raised by petitioner before this Court in the original petition for writ of certiorari [No. 73-787], where: the issue had not been raised in the California appellate courts; the

issue had not been raised in the petition for writ of habeas corpus in the district court; and, the issue had not been raised in the original appeal before the Court of Appeals.

2. Whether the Court of Appeals, after being directed by this Court to reconsider its earlier decision in light of *Taylor v. Hayes, supra,* properly held that that case did not compel a finding that the trial court judge should have recused himself and have allowed petitioner to be sentenced by another jurist.

3. Whether the contempt citation herein will hamper and limit the scope of argument by counsel in future cases.

STATEMENT OF THE CASE

On November 19, 1971, petitioner Aubrey Grossman, attorney at law, was cited for direct contempt of court by the Honorable James E. Jones, Jr., Judge of the Municipal Court, Central Judicial District, County of Sonoma, State of California. On November 23, 1971, the judge issued an order entitled "Order of Contempt," which found that petitioner had committed three separate acts of contempt on November 19, 1971. The order further adjudged that petitioner be punished by paying a fine of $500.00 and by serving five days in the county jail (CT 10, 11).

Petitioner, on November 29, 1971, made application for a writ of habeas corpus with the Superior Court of the County of Sonoma, State of California. Although habeas corpus relief was denied, the court

stayed execution of the sentence until February 14, 1972.

On December 30, 1971, petitioner filed a writ of habeas corpus in the California Court of Appeal, First Appellate District, Division Two. That court denied the writ without a hearing on January 3, 1972.

On January 12, 1972, petitioner filed a writ of habeas corpus in the California Supreme Court. On February 9, 1972, that Court directed respondent to show cause before the Court of Appeal, First Appellate District, why the requested relief should not be granted.

On March 13, 1972, the California Court of Appeal, First Appellate District, Division Two, heard oral argument and took the case under submission. On March 31, 1972, that court, in denying the requested relief, sustained two of the contempt citations, reversed the third and remanded the case to the trial court for resentencing. This opinion is reported in the official California records of decision. *In re Grossman*, 24 Cal.App.3d 624, 101 Cal.Rptr. 176 (1972).

On May 23, 1972, petitioner's request for a hearing before the California Supreme Court was denied.

On July 5, 1972, petitioner was resentenced. He was ordered to pay a fine of $500.00 and to serve five days in the county jail (CT 7).

On July 5, 1972, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California (CT 1). Later that day, the Honorable Albert C. Wollenberg,

United States District Court Judge, considered and denied petitioner's request for a writ of habeas corpus. No. 72-1229 ACW (CT 25).

A certificate of probable cause was issued on July 5, 1972, and a notice of appeal was filed (CT 25, 26). At the same time, petitioner was released from custody pending appeal to the United States Court of Appeals for the Ninth Circuit.

The United States Court of Appeals received briefs from both parties and heard argument before rendering its opinion. On July 11, 1973, the Court of Appeals sustained the determinations made by the district court, and with some additional comments, concurred in the findings and conclusions made by the California Court of Appeal.

On August 17, 1973, the United States Court of Appeals denied petitioner's request for a hearing *en banc*, and rendered an order clarifying its opinion.

On September 9, 1973, a petition for a stay was filed with this Court. Upon its denial, petitioner surrendered to respondent, Sheriff Donald Striepeke, served a five day jail sentence, and paid a fine of $500.00.

On November 15, 1973, petitioner filed a petition for a writ of certiorari with this Court. Opposition was filed by respondent on January 31, 1974.

On January 8, 1974, this Court issued the following order:

> "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded

> to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Taylor v. Hayes*, 418 U.S. ..... (1974)".

On August 8, 1974, the United States Court of Appeals issued an order, stating that even after further consideration as ordered, it adhered to its previous decision announced July 11, 1973. The Court of Appeals noted that *Taylor v. Hayes, supra*, was relevant to only one of the issues petitioner had raised *before it*, namely the issue of whether the contemned judge should have recused himself. (*See* 418 U.S. at 501-504).

Petitioner filed for rehearing, and suggested the appropriateness of a rehearing *en banc*, on September 23, 1974. On November 20, 1974, the United States Court of Appeals denied the petition for rehearing and rejected the suggestion for a rehearing *en banc*. In pertinent part, the order of that Court provided:

> "On the original appeal appellant failed to raise the issue of whether the state trial court erred in refusing to grant a hearing prior to final judgment and sentencing on the contempt citation, and the error complainted [sic] of is not plain error."

On December 18, 1974, petitioner again sought a writ of certiorari from this Court. Opposition was requested on January 29, 1975, to be filed on or before February 28, 1975.

STATEMENT OF FACTS

Petitioner Aubrey Grossman, attorney at law, appeared in the Municipal Court for the Central Judicial District, County of Sonoma, on November 25, 1970, at the arraignment of his client Gary Stra. This case was consolidated with two others and all were set for trial, to begin on February 9, 1971. The three consolidated cases involved a total of fourteen defendants. On February 3, 1971, the trial date was vacated until Febraary 17, 1971. On February 17, 1971, the trial was reset for May 4, 1971. Subsequently, this trial date was set and then reset for June 22, 1971. On June 16, 1971, petitioner appeared, and the trial date was confirmed for June 22, 1971.

Thereafter, on June 22, 1971, petitioner filed to have the cause removed to federal court. Removal was denied and the cause was remanded back to the Municipal Court on August 23, 1971.

On August 27, 1971, petitioner, acting through another attorney, sought to have the trial date in the Stra cases continued until November. The Honorable James E. Jones, Jr. was most reluctant to grant another extension since the consolidated case involved fourteen defendants, and especially since the matter had first been scheduled for trial more than six months previous. Although the court had theretofore permitted petitioner to postpone the trial a number of times, Judge Jones was adamant that another continuance would not be granted.

In denying petitioner's request to continue the matter another 60 days, Judge Jones stated:

> "[I]nitial charges here were made in November of 1970 and I have on prior occasions had some rather strong words with Mr. Grossman concerning the possible date of trial and I promised him that the matter was going to trial and rather promptly."
>
> "Mr. Grossman has used every tactic that is available and some not too ethical, I believe, to delay the setting of these cases for trial. Now is there any reason why he cannot be ready to go to trial in the month of September?" (August 27, 1971, Transcript p. 3, 4).[1]

Judge Jones commented on petitioner's delaying tactic of filing for removal of the consolidated cases to federal court, saying:

> "Mr. Grossman has tried to make federal cases out of these, but he just hasn't been successful in doing so. . . .
>
> "The Federal Court won't have anything to do with these matters." (RT 4, 5).

Subsequently, Judge Jones set the Stra cases for trial to begin on September 21, 1971 (RT 8). In response to this, Mr. Wilson, the attorney appearing on petitioner's behalf, advised the court of Mr. Grossman's intention to challenge the panel (RT 8). As a result of this statement, Judge Jones observed,

> "Mr. Grossman has done everything to clog the wheels of justice in this County in any event." (RT 8).

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[1]The transcript of August 27, 1971, will hereafter be cited as "RT".

On September 15, 1971, trial was reset for October 19, 1971. Subsequently the trial date was again reset and scheduled for November 16, 1971, on which date it did begin, slightly over nine months after it had first been set.

The third day of trial, the following exchange took place between petitioner and the trial judge:

> "Mr. Gallagher (Prosecutor): Your Honor, I'm objecting. I don't know as it's material for us to go through a litany of–––
>
> Mr. Grossman: You want to know about his activities. You are perfectly willing to ask him whether his activities was going around occupying —just one moment, please.
>
> The Court: Just a moment, please, Mr. Grossman. Let Mr. Gallagher finish first.
>
> Mr. Grossman: I started first. So I'm entitled to finish. Isn't that the rule in this court? If I start, I'm entitled to finish.
>
> The Court: Not when an objection is being stated, Mr. Grossman. You know better than that. If you continue to interrupt in such a fashion, not only will your record be so fouled up that it will never be undone, but I will take more firm steps to see that it doesn't recur, I think I make myself clear, do I not?" (Reporter's transcript of proceedings from November 19, 1971, hereinafter cited as PT: PT 6, 7.)

Although petitioner was warned by the court not to "continue in such a fashion," he did not heed the warning:

> "Mr. Grossman: Very snide kind of legal objection. But now may I reply to it?

The Court: You may.

Mr. Grossman: The question that he asked was, 'so you go around the co[u]ntry occupying.' All right. Doesn't he open the question of whether he does go around the country occupying? So I want to ask him about a place that he did occupy?

The Court: What has that to do with the issues in this case?

Mr. Grossman: Well, then, why did he ask it? I've said it before: If he's willing to open up an irrelevant field, then I'm entitled to redirect or on cross to go into the same field, unless there's a different rule for him than for me.

The Court: Mr. Grossman, you know better than that.

Mr. Grossman: I don't know better than that. So don't say I know better than that.

The Court: Mr. Grossman——

Mr. Grossman: I say what I believe. Don't say I know better than that. You're saying I'm a liar. I'm not a liar, Judge. Don't say I know better than that.

The Court: I cite that as misconduct, Mr. Grossman.

Mr. Grossman: What? That I said you call me a liar?

The Court: Is misconduct. Your whole line of conduct, Mr. Grossman. I think at this time it might be a good place to take our afternoon recess. I think counsel and the Court will have some conversation to engage in which should more properly be done outside the presence of the ladies and gentlemen of the jury. Now, we'll take our recess at this time until 10:00 o'clock on Monday morning. Once again, while we're disbanded, once

again let me remind you of my admonition about discussing the case or forming or expressing any opinions.

I expect counsel to remain.

(The jury recessed at 3:50 o'clock p.m.)

The Court: The record should note that the ladies and gentlemen of the jury have now cleared the courtroom.

Mr. Grossman, I've cited you for misconduct and taken exception of your remarks and the charges, both implied and explicit, that the court has different rules for the prosecution than the defense, and the accusation of judicial misconduct. Now, I would expect, first of all, an apology. Is one forthcoming?" (RT 7-9).

"Mr. Grossman: Well, I would suggest you have the record read back. You did not cite me for misconduct for that. You cited me for misconduct because I said that you were calling me a liar, and I'm no liar. And I suggest, before you engage in ruling on whether I've committed contempt, you better be sure that the record, which you're going to have to depend on, says that. Now, I say you cited me for misconduct for that. And you've realized since then how off base you were, because the remark you made to me, if I may finish, the remark you made to me was not that 'you ought to know better,' but 'you should know better.' And I'm smart enough to know you're calling me a liar before the jury. You're saying, 'You know better,' and I said to you, 'I don't know better and you don't call me a liar.' Now, I've got some rights. And you're prejudicing this jury against me.

The Court: I take it that that is not the form of an apology.

Mr. Grossman: What do you want an apology for?

The Court: Well, then, I need——

Mr. Grossman: I say, what do you want an apology for, what statement?

The Court: For the implications that you made, Mr. Grossman, both implied and explicit.

Mr. Grossman: Well, now—now we get to the nitty-gritty. If—if you're expecting a simple, formal apology of some kind, I'm perfectly willing to give it.

The Court: No, I'm not expecting a formal apology of some kind.

Mr. Grossman: Let me finish. I'm going to use words very precisely. If you want something that we often do, you know, you have an argument and you say you have an apology, I'm perfectly willing. I don't stand on principle or anything like that. But if you want me to say that I didn't mean the words I used when I said that I thought you were ruling in opposite ways, depending upon who made the objection, if you want me to say I lied, then, or I didn't mean it, then, if I apologize with that meaning, I would be lying. Because I still feel as I felt then, that your rulings, carefully analyzed, will show that it depends on whether the prosecution or the defense makes an objection or asks the question as to how the ruling's going to go. That's my belief. If I'm wrong, I'm wrong. But that happens to be my belief. And I think the record will show that I didn't say that—I think I asked the question. I meant to imply I thought that was true. But what I was trying to do was to get you to change your rulings on this point, because I felt the

ruling on this point proved conclusively this question of whether there is a discriminatory way. Now, let me go back to the thing that started it all. It is a principle that I have never seen denied by any judge that, if one counsel opens up a question whether it be hearsay or irrelevant, then the other counsel cannot be foreclosed from entering it. And if your Honor has ever seen a case or has ever seen a judge rule differently, tell me about it. I have never in the thirty-five years I've been practicing. Now, I think we ought to we ought to recognize that you made a mistake. Maybe you were rushed; maybe it was my fault you made it. Judges can make mistakes like anybody else. Maybe we can clear the air. Maybe I'll apologize, but maybe you'll say, 'Perhaps I made a mistake in my ruling,' and let's clear the air. I'm perfectly willing.

The Court: I'm not talking about the ruling, except——

Mr. Grossman: Well, your ruling started it; your ruling started it. You can't forget how it started.

The Court: Then, Mr. Grossman, I reaffirm my prior indication and I do hold you in contempt. I cite you for misconduct. And I will take that matter up at the conclusion of this trial. We'll stand recessed until——

Mr. Grossman: Just a minute, now.

The Court: We'll stand recessed until 10:00 o'clock——

Mr. Grossman: Just a minute, just a minute.

The Court: We're standing recessed.

Mr. Grossman: I am entitled to know something—it's a matter of due process—what I'm being cited for contempt for."

On November 23, 1971, upon conclusion of the trial, Judge James Jones presented petitioner with the order of contempt and sentenced him to pay a fine of $500.00 and serve five days in the county jail.

The order of contempt charged petitioner with performing the following acts in the immediate view and presence of the court:

> "[1] After having been repeatedly instructed and admonished by the Court to refrain from such activity and comment, continued to argue after the above-mentioned ruling of the Court had been made and announced.
>
> [2] In a loud, disorderly, contemptuous, insolent and rude manner and tone of voice, and in the presence of the jury, accused the Court of exercising different standards of judgment in favor of the prosecution and against the defense in determining the admissability of proffered evidence.
>
> [3] In a loud, disorderly, contemptuous, insolent and rude manner and tone of voice, and in the presence of the jury, falsely accused the Court of calling him a liar.
>
> That said act and words were grossly contemptuous of the orderly process and dignity of the Court, and tended to and did, interrupt the due course of the trial." (CT 10, 11).

The second and third citations of contempt were sustained by the California Court of Appeal and are thus still at issue in this proceeding.

ARGUMENT

I

THE COURT OF APPEALS PROPERLY LIMITED THE SCOPE OF ITS "FURTHER CONSIDERATION IN LIGHT OF TAYLOR v. HAYES" TO THE ISSUE OF WHETHER THE STATE TRIAL JUDGE HAD BECOME SO PERSONALLY EMBROILED WITH PETITIONER THAT HIS RECUSAL WAS DEMANDED. THE APPLICABILITY OF A SECOND ISSUE DISCUSSED IN TAYLOR, THAT OF THE NOTICE AND RIGHT TO SPEAK IN ONE'S BEHALF REQUIRED WHEN CITATION FOR SUMMARY CONTEMPT OCCURS DURING TRIAL BUT FORMAL ADJUDICATION AND SENTENCING IS DELAYED, WAS PROPERLY NOT CONSIDERED BY THE COURT OF APPEALS, BECAUSE: THE ISSUE WAS NOT RAISED IN THE STATE APPELLATE COURTS; THE ISSUE WAS NOT RAISED IN THE ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS IN THE DISTRICT COURT; THE ISSUE WAS NOT RAISED IN THE COURT OF APPEALS IN THE ORIGINAL APPEAL; AND, THE ERROR FIRST COMPLAINED OF IN THE FIRST PETITION FOR WRIT OF CERTIORARI WAS NOT OF SUCH DIMENSION THAT THIS COURT COULD HAVE THEN CONSIDERED IT.

A. A Brief Comparison of the Positions Asserted by the Parties Concerning When the "Notice and Hearing" Issue (Taylor II) Was Raised.

The overwhelming majority of petitioner's instant prayer before this Court is addressed to the applicability of one section of *Taylor v. Hayes, supra,* to his own situation. That section in *Taylor* was denoted "II" by this Court (418 U.S. at 496-500); respondent will henceforth refer to it by the shorthand notation *Taylor II.*[2]

---

[2]Section I of the *Taylor* opinion is not at issue here. Section III, dealing with the need for recusal of the contemned judge (418 U.S. at 501-504) is at issue, and will henceforth be referred to by use of the parallel notation *Taylor III.*

Before he can urge that that section should have caused a reversal of the original Court of Appeals opinion, petitioner must persuade this Court that the issue to which *Taylor II* speaks was raised in the Court of Appeals. (*See* Petn. Cert. at 25-36). His argument is that the issue was raised in the state trial court, was not raised in the United States District Court in the petition for writ of habeas corpus, but was thereafter raised by implication in the United States Court of Appeals on the original appeal, and was, in any event, explicitly raised before this Court in the original petition for writ of certiorari.

Petitioner's assertion as to when the issue was raised is disputed by the Court of Appeals. That court's order of November 20, 1974, states unequivocally that the issue was *not* raised by petitioner in the first appeal (Petn. Cert. APPENDIX D). The order is silent as to whether the issue was raised in the state courts. Respondent likewise contends that the issue was not raised before either the district court or the Court of Appeals. In addition, however, it is here asserted that petitioner did not raise the issue in the California appellate courts. It is this latter failure to perfect his claim which must now have the most serious consequences for petitioner's cause.

B. Why Does It Matter When the Issue Was Raised?

(1) In the Federal Courts.

When the *Taylor II* issue was raised is important for one reason only: knowledge of the fact defines the posture in which the cause first reached this Court. Because this Court's remand order directed

only that there be a further consideration of *that same cause*, the Court of Appeals was limited in its reconsideration to such discussions in *Taylor* as were addressed to issues before the Court of Appeals originally, *i.e.*, to a reconsideration including *Taylor III*, but not including *Taylor II*. Thus, it must be considered whether the *Taylor II* issue was before the Court of Appeals originally.

Petitioner ends his discussion on that point by asserting that if doubt exists, it should be resolved in his favor (Petn. Cert. 35-36). Respondent begins by riposting that there is no room for such "doubt", given the Court of Appeals finding that the issue had not previously been before it. In the absence of other considerations, that finding is dispositive. Whether that finding is correct is the only possible concern now.

If the Court of Appeals was correct that the issue was not previously raised, it follows that this Court ordinarily could not have considered it for the first time on petition for writ of certiorari. *Swenson v. Stidham*, 409 U.S. 224, 231 (1972); *United States v. Fleischman*, 339 U.S. 349, 365 (1950); *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937); *but see* Supreme Court Rule 40(1)(d)(2). Petitioner would have had to have demonstrated to the Court of Appeals not only the precise nature of his claim, but also that the claim was constitutionally grounded. *Bailey v. Anderson*, 326 U.S. 203, 207 (1945). He did neither, hence review of the issue would not have been proper.[3]

[3]The answer petitioner must make is that the alleged failure to allow him the sort of "hearing" specified in *Taylor II* constituted "plain error", of a grossness such as would forgive any require-

Vachon v. New Hampshire, 414 U.S. 478, 479 (1974) (dissenting opinion of Rehnquist, J.)

Petitioner urges that the issue was raised in the original appeal to the Court of Appeals, for two reasons. First, he contends that the issue was raised because he stated in his statement of the case section of the appellant's brief that he had asked for a hearing in the state trial court (Petn. Cert. 32). Were petitioner to make a similar argument before this Court, it would not succeed. *Connecticut Ry. Co. v. Palmer*, 305 U.S. 493, 496-497 (1939). Similarly, the United States Court of Appeals for the Ninth Circuit would not consider any issue only hinted at in a factual description of the case. *Flemings v. Wilson*, 365 F.2d 267 (9th Cir. 1966).

Second, petitioner asserts that the hearing issue discussed in *Taylor II*, which he did not specifically articulate, was raised because the recusal issue discussed in *Taylor III*, which he did articulate, ". . . tended to merge . . ." with the other (Petn. Cert. at 29-31, 32-34). As another passage of petitioner's in-

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ment that the issue be properly perfected. *See also* Fed. Rules of Crim. Proc. 52(b); *United States v. Atkinson*, 297 U.S. 157, 160 (1936). That answer fails to account for the fact that the case has previously been before this Court. If the alleged failure to accord a *Taylor II* hearing is now plain error, it was equally so then. This Court could then have simply reversed on that precise ground. But no such extraordinary action was taken. Rather, the case was remanded for further consideration in light of *Taylor*. While respondent shares the commentators' mystification as to the substance behind the label "plain error"—3 Wright, *Federal Practice and Procedure*, section 856, at 373-374—it is of primary importance that this Court has previously been presented with the opportunity to declare "plain error" existed in this case, and declined to do so. That refusal lends specific substance to the label as applied in this case.

stant pleading before this Court indicates,[4] he views the "hearing" contemplated in *Taylor II* and that contemplated in *Taylor III* as being *the same hearing*. This position apparently is that one must first demonstrate the right to a "hearing" (in the sense in which *Taylor II* uses that term) before he is entitled to claim that the trial judge must recuse himself, thus permitting a "hearing" (in the *Taylor III* sense) before another judge. That petitioner views the "hearings" as being one and the same is obvious. The point is also critical to his argument, since if the "hearing" is the same in both instances, by arguing for it in one way, he has impliedly argued for it in other ways as well. Such must be the argument petitioner makes.

The problem with the argument is that the term "hearing", if applied to the *Taylor II* and *Taylor III* situations, contemplates two distinct proceedings, both as to purpose and scope.[5] To fully delineate those differences, one must begin by noting that there are three basic factual postures in which a contempt case might come before this court. In the first, the contemnor is cited, adjudicated, and sentenced for his contempt all at the same time. Of this type of case, it may be remarked that the contempt is direct, and that all aspects of the judicial response are handled instantly.

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[4]". . . for unless petitioner had a right to a hearing in the first instance, it would have been pointless to have argued the embroilment issue, which turns on the right *to a hearing* before another judge." (Petn. Cert. 29) (emphasis in original).

[5]It was T. S. Eliot who remarked, ". . . words strain/crack and sometimes break, under the burden,/Under the tension, slip, slide, perish, Decay with imprecision, will not stay in place,/Will not stay still . . ." in "Burnt Norton", from *The Four Quartets*.

Even in such a case, "the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution." *Groppi v. Leslie*, 404 U.S. 496, 504-505 (1972); *see Levine v. United States*, 362 U.S. 610, 613-614 (1960). A second case is so-called "indirect" contempt in which the contumacious behavior occurs out of the contemned jurist's presence. Because the jurist has not witnessed the behavior personally, any action by him logically will depend on what he is told by others. Thus, a full hearing with notice and the right to cross-examine witnesses, is appropriate. Rule 42(b), Fed. R. Crim. P.; *Johnson v. Mississippi*, 403 U.S. 212, 215 (1971). At stake in this "hearing" is the very legal correctness of any contempt adjudication: "allocution" does not go to that same correctness. The third case, of which the instant action is an example, involves direct contempt behavior committed in the presence of the judge. However, if it occurs during an ongoing trial, and if the contemnor is an attorney involved in that trial, the rights of the parties to the litigation must be compromised by instant adjudication and sentence. Hence, it usually happens that the contemnor is cited for contempt, and advised that formal adjudication and sentencing will occur at the conclusion of the court's business. *See, e.g. People v. Fusaro*, 18 Cal. App.3d 877, 889-890, 96 Cal.Rptr. 368, 375-376 (1971). Because these formal requisites are delayed, however, one of the justifications for summary action, necessity, [*see Offutt v. United States*, 348 U.S. 11, 14 (1954)] is no longer cogent. *Taylor v. Hayes, supra*, 418 U.S. at 497; *see also United States v. Meyer*, 462 F.2d 827,

838 (D.C. Cir. 1972). Thus, any "hearing" will be in the nature of an expanded allocution, with the contemnor given the opportunity, for example, to urge "that the behavior at issue was not contempt but the acceptable conduct of an attorney representing his client". *Taylor v. Hayes, supra*, 418 U.S. at 499. The contemnor might also present matters in mitigation or might try to apologize to the court. *Id.* The "hearing" is not the same full-scale inquiry that is contemplated by Rule 42(b) for indirect contempt cases. The *Taylor II* "hearing" is somewhere between bare allocution and a full-scale trial proceeding. Because direct contempt is still involved, however, the "hearing" must still be closer to the former procedure than to the latter.

When the issue is whether the contemned jurist must recuse himself because he has become "embroiled" with the contemnor, *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), an affirmative answer to that question will result in another hearing on the contempt before a new judge. *Taylor v. Hayes, supra*, 418 U.S. at 501-502. The second judge will conduct a full inquiry into the charges, and determine their legal sufficiency. *Mayberry v. Pennsylvania, supra*, 400 U.S. at 466. The reason for a full-scale proceeding is not difficult to suggest—as to the second judge, who has not witnessed its occurrence, the contempt is an indirect one. Thus, the "hearing" contemplated in *Mayberry* and in *Taylor III* is the one appropriate for indirect contempts: a full trial-type inquiry into the legal sufficiency of the charges.

The upshot is that petitioner is incorrect to contend that *Taylor II* and *Taylor III* speak of the same (or even of a set of analogous) "hearing" rights. It is quite possible to argue that the contemned judge here should have recused himself and so permitted a full hearing before another judge, without thereby saying anything about the hearing the contemned judge himself (if found not to be embroiled) was bound to afford petitioner. The two issues do not inevitably "merge"; they are logically independent, each of the other.

Neither of petitioner's reasons are sufficient to persuade that the *Taylor II* issue was raised in the Court of Appeals originally. It should further be noted that not even petitioner contends the issue was aired in the original habeas corpus petition filed in the district court. Failure to raise the issue there provided added reason for the Court of Appeals to refrain from later considering it, even assuming it had been raised for the first time on appeal. *Macon v. Craven*, 457 F.2d 342, 343 (9th Cir. 1972); *Hughes v. Wilson*, 365 F.2d 595, (9th Cir. 1966); *Flemings v. Wilson, supra; cf.* Rule 30, Fed. R. Crim. P.

Because the issue was never raised in federal court at any time prior to the first petition for certiorari, and because any possible error was not in the nature of "plain error" such as would have justified this Court in annulling the contempt citations at that time, the remand order could not have included any direction that the Court of Appeals consider the *Taylor II* issue. *Swenson v. Stidham, supra.*

(2) In the State Courts.

Petitioner does not consider the implications of a far more serious failure to raise the issue. As to when the issue was raised in the state courts, he says only that the trial court was informed of his demand for a hearing. (Petn. Cert. 25-28, APPENDIX I). There is no contention that any California appellate court was presented with the issue, as indeed there could not be. Yet it is precisely this failure, to present his claim to the California appellate courts, which should be of paramount concern now.[6]

When this case began its tortuous procession through the federal courts, it came in the procedural cloak of an action brought under Title 28, United States Code section 2254. It was a petition for a writ of habeas corpus to secure release from custody imposed by the State of California. It goes without saying that the action had to comply with all requirements of Title 28, United States Code section 2254. That section in pertinent part provides:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted

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[6]It is undisputed that petitioner raised the embroilment issue before the state courts. *In re Grossman, supra*, 24 Cal.App.3d at 631-632, 101 Cal.Rptr. at 180-181. Thus, it is fair to assume petitioner would argue his "merger" theory there as well. For the reasons already suggested, the theory is no more persuasive as to the California courts than as to the federal panels.

The California Court of Appeal did not consider the *Taylor II* issue, as is indicated by its citation of *Groppi v. Leslie, supra*, in another context. *In re Grossman, supra*, 24 Cal.App.3d at 631 n. 3, 101 Cal.Rptr. at 180 n. 3. That court was aware of *Groppi*, but was not advised of its precise impact by petitioner.

> the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."[7]

See also Title 28, United States Code section 2254(c). Since the *Mayberry (Taylor III)* issue had been raised all through the state courts, raising of it in the district court was eminently proper. The same cannot be said of the *Taylor II* issue. It was not raised in the state appellate courts, hence there would have been a failure to exhaust state remedies as to it had the issue appeared in the original petition for writ of habeas corpus. It has already been shown that the issue was not raised in the federal courts until the petition for the writ of certiorari. The combined effect of these two failures, to exhaust state remedies, and to even attempt to raise the issue in the lower federal courts, was to absolutely preclude consideration of the issue by this Court. *Picard v. Connor*, 404 U.S. 270, 275-276 (1971).

The failure to exhaust carries yet another implication. Had the failure to raise the *Taylor II* issue occurred in the federal courts only, respondent still

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[7]Petitioner could conceivably contend that the California appellate process was ineffective to vindicate his *Taylor*-type rights. The argument would have to be that the California courts had demonstrated by their handling of his case a marked disinclination to afford him the due process rights enunciated by this Court. Any such argument would have to fail. The California Supreme Court, after all, retransferred the cause to the California Court of Appeal, with directions to reconsider in light of this Court's then newly-announced decision in *In re Little*, 404 U.S. 553 (1972). *See In re Grossman, supra*, 24 Cal.App.3d at 627, 101 Cal.Rptr. at 178.

would be forced to account for the possibility of "plain error", especially as contemplated in Rule 40 (1)(d)(2) of this Court. The failure to exhaust adds a new dimension to any consideration of "plain error". If even the possibility of "plain error" in petitioner's case is recognized, the effect must inevitably be to undercut the exhaustion requirement. That undercutting would be especially ill-advised, as the requirement goes to the heart of "our dual system of government". *Picard v. Connor*, *supra*, 404 U.S. at 275; *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971).

Petitioner's failure to exhaust and his presentation of the issue for the first time before this Court when he had always been aware of the circumstances generating the issue was, simply put, an abuse of the federal habeas corpus remedy. *Sanders v. United States*, 373 U.S. 1, 10 (1963); *Wong Doo v. United States*, 265 U.S. 239, 241 (1924). He was presumably aware of *Groppi v. Leslie*, *supra*, upon which the holding in *Taylor II* was expressly bottomed (418 U.S. at 498-499). There is no question here of petitioner being "surprised" by a new legal rule, *compare Silber v. United States*, 370 U.S. 717 (1962) hence a final possible justification for application of the "plain error" doctrine to petitioner's case vanishes.

(3) Conclusion.

This Court could not have considered the *Taylor II* issue when it was raised for the first time in the original petition for writ of certiorari. The Court of Appeals had not previously considered the issue, as indeed it could not, given the failure to exhaust. When

the cause was ordered returned to the Court of Appeals, nothing could be implied in the order that the *Taylor II* issue be considered for the first time in the Court of Appeals. Mere passage of time could not forgive the need to exhaust state remedies. The Court of Appeals was therefore correct, insofar as it declined to consider the *Taylor II* issue.[8]

II

ON RECONSIDERATION OF THE CAUSE, THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE TRIAL JUDGE WAS NOT "EMBROILED" WITH PETITIONER, WITHIN THE CONTEMPLATION OF TAYLOR v. HAYES, 418 U.S. 488, 501-504 (1974).

The Court of Appeals reconsideration order of August 8, 1974, evidencing an intent to stand by its previous decision, was eminently correct. That order stated that the Court of Appeals had been unable to find a "likelihood of bias" or an "appearance of bias" sufficient to indicate that the trial judge had become "embroiled" within the meaning of *Taylor v. Hayes, supra.* (Petn. Cert. APPENDIX E). On its face, the order reveals that the Court of Appeals channelled its analytic efforts in the directions mandated by *Taylor* (and by *Mayberry v. Pennsylvania, supra,* before that). In result, the order demonstrates a reasonable conclusion that petitioner's case is distinguish-

[8]Respondent submits, however, that the Court of Appeals was incorrect to rest its decision on the belief that the issue did not raise "plain error". The better course would have been to hold that failure to exhaust was the reason for that court's order.

able from *Taylor III*. Not surprisingly, petitioner disputes the accuracy of both the analysis and the conclusion.

A. The Court of Appeals' Analysis: Did That Court "Read" Taylor III Correctly?

(1) Petitioner's Contention Summarized and Evaluated.

According to petitioner, *Taylor III* "expands" the *Mayberry* test for gauging embroilment (Petn. Cert. 58). Apparently that expansion is so great as to mean that if there is *not* embroilment present, neither is there contempt. (Petn. Cert. 60). That is, petitioner seems to believe that the presence of contempt necessarily involves the presence of embroilment. In further support of the assertion, petitioner cites footnote 10 of this Court's opinion in *Taylor*. (Petn. Cert. 60).

The problems with petitioner's argument commence upon any close scrutiny of that footnote. It indicates only, that in addition to the contemnor's conduct, the conduct of the contemned judge is a factor which might argue for recusal. 418 U.S. at 503 n. 10. Indeed, it is only the prevalence of the second factor in *Taylor* which distinguishes that case from *Mayberry*, in which the contemnor's conduct was of primary import. Properly read, *Taylor* does not enlarge or expand *Mayberry*, but only indicates that embroilment may arise from a different source, and provides a concrete example of it.

Finally, it is not correct that *Taylor* has, in effect, equated "contempt" and "embroilment". Consider the situation where the contemnor is at all times respect-

ful and courteous, yet by his actions causes a disruption of the court, and where the contemned jurist acts at all times with restraint. No embroilment exists, yet the contempt has occurred. *Bell v. Hongisto*, 501 F.2d 346, 357 n. 13 (9th Cir. 1974) (attorney refused to proceed with trial before judge after disqualification motion ruled untimely).

(2) The Nature of Embroilment.

In *Mayberry v. Pennsylvania, supra*, this Court was presented with the situation of a direct contempt being cited instantly, but adjudicated and sentenced subsequently. Because both adjudication and sentencing were deferred, any inference of a need for immediacy vanished, and any subsequent summary treatment had to be justified on the grounds of conservation of scarce judicial resources, *i.e.*, that the contemned judge was most competent to interpret the facts and apply the law. *United States v. Meyer, supra*, 462 F.2d at 836-841. That rationale depends for its efficacy on the actual ability of the contemned judge to act as a competent fact finder. It is that ability which *Mayberry* first scrutinized.

The scrutiny is of the contemned judge, from both personal and institutional perspectives. The former, personal scrutiny, is made necessary by a natural doubt about the judge's ability to avoid being biased against the contemnor. The latter, institutional scrutiny, is necessary due to a consideration ". . . that where the judge has been personally, vilified the appearance of justice is sacrificed if the vilified judge

acts as the prosecutor, fact finder, and sentencer *even if the vilified judge is totally unbiased." Guzzell v. Wainwright*, 481 F.2d 405, 406-407 (5th Cir. 1973). (Emphasis supplied).

Any inquiry from a personal perspective is concerned with: (1) the nature of the attack on the judge, whether addressed to him personally or to his office generally; (2) any indication the judge himself gives of losing control; (3) the extent of the vilification; (4) the actual words spoken. The more personal the attack on the judge, the more likely it is that recusal is appropriate. *Mayberry v. Pennsylvania, supra*, 400 U.S. at 464; *see also Ungar v. Sarafite*, 376 U.S. 575, 580 (1964). Similarly, any indication the judge gives, as by affirmatively assuming an "adversary" posture *vis à vis*, the contemnor, may necessitate recusal. *Taylor v. Hayes, supra*, 418 U.S. at 503k, n. 10; *United States v. Scale*, 461 F.2d 345 (7th Cir. 1972); *cf. Johnson v. Mississippi, supra.*[9] The extent of the vilification and the actual words spoken both relate to the nature of the attack on the judge, and are thus further glosses on the primary *Mayberry* concern, acts by the contemnor.

In his concurring opinion in *Mayberry*, Chief Justice Burger noted, "Our holding . . . does not reflect on his [the contemned judge's] performance; it re-

[9]Where the "adversariness" results from forces outside the contemned jurist's personal control, it is probable that an institutional inquiry is appropriate. In *Johnson*, for example, the judge was a defendant in a civil rights suit previously instituted by the contemnor.

lates rather to a question of procedure." 400 U.S. at 469. Under certain circumstances, because of unique relationships, there is created the unacceptable likelihood of bias, no matter how calm the judge. *Peters v. Kiff*, 407 U.S. 493, 502 (1972); *In re Murchison*, 349 U.S. 133, 136 (1955). It is possible to identify certain relationships which have given rise to the likelihood. An extreme sentence, such as the 22 year term of imprisonment imposed in *Mayberry*, raises the spector of bias. *Mayberry v. Pennsylvania, supra*, 400 U.S. at 469 (concurrence of Harlan, J.); *Taylor v. Hayes, supra*, 418 U.S. at 502-503 (4½ years imprisonment, disbarment from further practice before contemned court). On the other hand, listening to the contemnor's explanation, or to any motions he wishes to make, would tend to indicate a lack of "embroilment." *In re Chase*, 468 F.2d 128, 136 (7th Cir. 1972); *cf. Groppi v. Leslie, supra*, 404 U.S. at 506.

What has been said about embroilment generally makes it possible to distinguish between *Mayberry* and *Taylor* specifically. The latter case focuses on those indications the contemned judge *himself* gave of becoming embroiled. It is the jurist's response which is of concern, 418 U.S. at 502-503, together with any institutional consideration applicable. (In *Taylor*, the sentence was excessive, and the trial judge threatened to gag the contemnor).

(3) The Court of Appeals' Order.

As noted, the Court of Appeals accounted for both the likelihood of bias (institutional considerations)

and the appearance of bias (personal considerations). On the face of the order it appears the Court of Appeals correctly identified the legal issue assigned it by this court's remand order. *Taylor v. Hayes, supra,* 418 U.S. at 501.

B. The Court of Appeals' Conclusion: Did that Court "Apply" Taylor III Correctly?

Petitioner contends that his case cannot be distinguished from *Taylor* because: (1) in both cases, disparaging remarks were made by the trial judges concerning the attorney's ethics; (2) in both cases, maximum sentences were handed down and bail pending appeal refused. (Petn. Cert. 58-59).

As to the disparaging remarks, those in *Taylor v. Hayes, supra,* were continuing, numerous, and increasingly vitriolic, so much so that they could be characterized as "a running controversy". 418 U.S. at 501. The comment cited by petitioner is isolated, and is not repeated in later, more biting forms. Finally, the comment appears to have a definite reason behind it. Petitioner had heard the trial date reset for June 22, 1971. He appeared to confirm the date on June 16, 1971. He then waited until the date set for trial before filing to have the cause removed to federal court. It was this last minute filing, which definitely caused the proceeding to be disrupted, which occasioned the trial court's remark (Petn. Cert. 58, n. 9). This case simply does not demonstrate the increasing anger on the part of the contemned judge which caused recusal in *Taylor v. Hayes, supra.*

In both cases, bail pending appeal was denied. Yet it is not that which *Taylor* says reflects embroilment, but rather the severity of the sentence. 418 U.S. at 502-503. What distinguishes this case from *Taylor* is the fact that here the sentence was of five *days* imprisonment, not over four *years*. The sentence does not create the likelihood of bias, as it is within the allowable punishment limits for summary direct contempt provided by California statute. Calif. Code of Civil Procedure section 1218.

Because the cases are vastly different in degree, and are distinguishable, the Court of Appeals could reasonably conclude that a reconsideration in light of *Taylor v. Hayes, supra,* necessitated no new result.

III

PETITIONER'S CONTENTION THAT HIS CONTEMPT CONVICTION WILL RESULT IN A "CHILLING EFFECT" ON HIS AND OTHER ATTORNEYS' DUTY TO ARGUE FORCEFULLY ON BEHALF OF THEIR CLIENTS IS WITHOUT MERIT; THE REMARKS CITED AS CONTEMPTUOUS BELOW PASSED FAR BEYOND ACCEPTED LIMITS OF ADVOCACY.

Although there is no vested right in an individual to practice law, there is a right in the court to protect itself, and hence society, as an instrument of justice. *In re Isserman*, 345 U.S. 286, 289 (1953).[10]

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[10]This Court has also ruled that disbarment, following a contempt citation, is not excessive or vindictive punishment. "Such an attitude misconceives the purpose of disbarment." *In re Isserman, supra.*

Any possible disciplinary proceedings pending against petitioner are not dependent upon any ruling by this Court. Disbarment or

Counsel, however, does have the right to press a claim even if it appears farfetched and untenable.

> "Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or insult the judge—his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation." *Sacher v. United States,* 343 U.S. 1, 9 (1951).

In the instant case, Mr. Gallagher, the prosecutor, began to make an objection to petitioner's line of questioning. However, before Mr. Gallagher could fully make the objection, he was interrupted by petitioner. The trial court judge asked petitioner to allow the prosecution to finish his objection, but instead petitioner began arguing with the Court. The Court warned petitioner not to interrupt again; however, he did not heed the warning.

> "Mr. Grossman: Well, then why did he ask it? I've said it before: If he's willing to open up an irrelevant field, then I'm entitled to redirect or on cross to go into the same field, unless there's a different rule for him than for me.
>
> The Court: Mr. Grossman you know better than that.

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other disciplinary proceedings can be brought without the necessity of a conviction.

Thus, petitioner's allegation that disciplinary proceedings are pending against him, even if considered, affords him no greater claim to relief. If the acts constituted contempt, as found by the state courts, disciplinary proceedings are indeed appropriate. *In re Isserman, supra.*

> The Court: Mr. Grossman——
>
> Mr. Grossman: I say what I believe. Don't say I know better than that. You're saying I'm a liar. I'm not a liar, Judge. Don't say I know better than that.
>
> The Court: I cite that as misconduct, Mr. Grossman."

The above passage indicates that petitioner interrupted the Court after he had been warned that his conduct was improper. This conduct can not in any stretch of the imagination be viewed as "advocacy". Rather it is illustrative of counsel placing his own emotions above his client's needs and rights. As a result of petitioner's outburst, *on his own behalf,* the trial was recessed and the jury was sent home for the day. Petitioner's conduct and the obstruction it caused in the administration of justice amounted to contempt. *See In re McConnell,* 370 U.S. 230 (1962).

Petitioner and any other attorney should not feel constrained to abandon or limit argument when pursuing a legitimate legal issue. However, when the Court is engaged in argument which is not purposeful, but only vengeful, a citation can be expected. *See Ungar v. Sarafite, supra; Sacher v. United States, supra.*

Since this Court has defined the parameters of legitimate argument, and attorneys can look to these decisions for guidance, there is no merit to petitioner's contention that this case will cause a "chilling effect" on future advocacy by counsel.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
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